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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CA No. 81-5602

DC No. CV 81-393 PHX VAC

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY; and MARY PRICE,
*Defendants-Appellants.*

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[Filed Jul. 23, 1982]

Appeal from the United States District Court
for the District of Arizona
Valdemar A. Cordova, District Judge, Presiding
Argued and submitted February 10, 1982

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OPINION

Before: FARRIS, FERGUSON and NELSON, Circuit Judges.

FARRIS, Circuit Judge:

The Phoenix Union High School District appeals an order of summary judgment entered in favor of the United States. The United States Department of Education Office for Civil Rights sought certain minutes from the School District Governing Board's executive session

meetings as part of its investigation to determine whether the School District was complying with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (1976 & Supp. III 1979), which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. The investigation focused on the School District's policies and practices of assigning students to and within its schools.

Following several unsuccessful efforts at voluntary compliance with its request to inspect the school district's minutes, the Department of Education brought this action to compel disclosure.

The district court granted summary judgment for the United States and ordered the School District to permit access to minutes after January 4, 1961 that were relevant and not protected by the attorney-client privilege. The court prohibited the Department of Education from disclosing the content of the documents without further court order, and agreed to resolve all disputes concerning relevance or privilege.

The School District appealed.

The School District argues that it is absolutely barred from disclosing the minutes by Ariz. Rev. Stat. Ann. § 38-431.03(B) (1974 & Supp. 1981), which provides, "Minutes of executive sessions shall be kept confidential except from members of the public body which met in executive session."

The Arizona Court of Appeals applied a balancing test to determine whether a similar state statutory privilege prevented disclosure of confidential information in *Hanson v. Rowe*, 18 Ariz. App. 131, 134, 500 P.2d 916, 919 (1972). It relied on *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384, 388 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), which held that the granting or withholding of any privilege requires a balancing of competing policies. Under these circumstances, the generally worded

privilege here is construed to prohibit voluntary public disclosure and not disclosure pursuant to a legitimate legal inquiry. *See, e.g., Hanson*, 18 Ariz. App. at 134, 500 P.2d at 919. *See also United States v. Nixon*, 418 U.S. 683, 711-13 (1974).

The Department of Education argues that the School District is contractually obligated to permit inspection of the requested minutes. It points out that the School District, as a recipient of federal financial assistance, was required to sign an assurance of compliance contract wherein it agreed to "comply with title VI . . . and all requirements imposed by or pursuant to the Regulation of the Department. . . ." The implementing regulations include 34 C.F.R. § 100.6(c),[1] which provides:

> Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. . . . Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

The Department of Education contends that this section places a clear responsibility on the School District to cooperate with the Department of Education's investigation to determine whether the School District is complying with the requirements of Title VI. We agree.[2] In a

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[1] Formerly 45 C.F.R. § 80, *et seq.*

[2] Because these regulations are clear and unambiguous and the School District's acceptance of them was knowing and voluntary, there is no question of constitutional infirmity under *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

similar dispute contesting access by the Department of Health, Education, and Welfare to various college records, we relied on the assurance of compliance contract in requiring the college to furnish the information sought. *United States v. El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). *See also Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (The "school district contractually agreed to 'comply with title VI . . . and all requirements imposed by or pursuant to the Regulation' of HEW (45 CFR pt. 80) which are 'issued pursuant to that title . . .' "); *Soria v. Oxnard School District Board of Trustees*, 386 F. Supp. 539, 545 (C.D. Cal. 1974).

The contractual assurance of compliance is not without limits. It must be applied with an eye toward striking a proper accommodation between the federal interest in ascertaining compliance with Title VI and the state's legitimate countervailing interests. Section 100.6(c) permits access only to information "as may be pertinent to ascertain compliance." 34 C.F.R. § 100.6(c). The section provides that "considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance. . . ." The district court permitted access to confidential minutes of executive session meetings from 1961 to the present which were relevant to the Department's investigation and not protected by the attorney-client privilege. The court properly weighed the competing interests in fashioning an appropriate protective order. We find no error in the order.

Further, the state statute is preempted to the extent it frustrates the congressionally mandated duty to investigate whether public programs receiving federal funds are complying with Title VI.[3]

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[3] The Department of Education's Office for Civil Rights is required by 34 C.F.R. § 100.7(a) to determine periodically whether recipients are complying with Title VI and its implementing regulations.

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

*Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) (citations omitted).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CIV-81-393-PHX-VAC

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

PHOENIX UNION HIGH SCHOOL DISTRICT, *et al.*,
*Defendants.*

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[Filed Jul. 15, 1981]

ORDER

Plaintiff's Motion for Summary Judgment and Motion to Quash Subpoena Duces Tecum and for Order Prohibiting Taking of Deposition having come on regularly for hearing before the Court July 6, 1981, and the Court having been presented with memoranda by both counsel, having had an opportunity to read the same, having heard the arguments of counsel and being fully advised on the premises,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment is granted to the extent that Defendants will be required to permit Plaintiff access to Defendants' executive session minutes beginning January 4, 1961, and furnish copies which are relevant to Plaintiff's investigation of the Phoenix Union High School District to determine its compliance status with Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, et seq.

2. The access which Defendants are to provide Plaintiff will commence on August 3, 1981, and shall continue

thereafter during Defendants' normal business hours at Defendants' District office located at 2526 West Osborn Road, Phoenix, Arizona, or at such other place and at such other times to which the parties may otherwise agree, until Plaintiff's review of those materials is completed.

3. Prior to Defendants permitting access by Plaintiff to its executive session minutes, Defendants may review those executive session minutes commencing January 4, 1961, to the present to determine which portions of them, if any, may be privileged as communications between attorney and client, and which of them, if any, may not be relevant to the Plaintiff's investigation above described. Defendants shall provide Plaintiff, on or before July 27, 1981, with copies of all available agenda for executive session meetings. For any minutes or portions of minutes which are deemed to be privileged or irrelevant by Defendants, Defendants shall prepare and provide to Plaintiff, on or before August 3, 1981, a listing of those minutes or portions of minutes which will include the following information:

A. Date of the meeting;

B. Persons present at the meeting;

C. The subject matter discussed at the meeting or portion of the meeting which is deemed to be privileged or irrelevant; and

D. Defendants' description of the minutes as being either privileged or irrelevant, or both.

4. Should there be any disagreement between the parties with respect to withholding by Defendants of any executive session minutes based upon assertions of attorney-client privilege or irrelevance to Plaintiff's investigation, those matters may be brought before the court for a determination . . . . as to whether or not the assertions of privilege and irrelevance are appropriate.

5. No material to which Plaintiff is permitted access pursuant to this Order shall be disclosed by Plaintiff or its agents or employees to any person or entity not an investigator or lawyer employed by the United States of America in either its Department of Justice or Department of Education, Office for Civil Rights, without prior application to and order of this Court, permitting the parties hereto an opportunity to advise the court with respect to their respective positions concerning such disclosure. Should any inquiry be made to Plaintiff, its agents or employees, in the nature of a request for disclosure of such information, a copy of this Order shall be provided to any such person or entity making such inquiry, and no further disclosure of any kind shall be made to such inquiring person or entity without further order of this court.

6. Plaintiff's Motion to Quash and for Order Prohibiting Taking of Deposition, based upon the foregoing determinations and orders, is granted.

DONE this 14th day of July, 1981.

/s/ Valdemar A. Cordova
VALDEMAR A. CORDOVA
Judge of the Federal Court
for the District of Arizona

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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No. 81-5602

DC CV 81-393 VAC

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
vs.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY; and MARY PRICE,
*Defendants-Appellants.*

[Filed Sep. 13, 1982]

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Appeal from the United States District Court
for the District of Arizona (Phoenix)

## JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST Sep. 7, 1982
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Oscar Tagle
OSCAR TAGLE
Deputy Clerk

Filed and entered July 23, 1982

# IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 81-5602

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY and MARY PRICE,
*Defendants-Appellants.*

[Filed Aug. 30, 1982]

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## ORDER

Before: FARRIS, FERGUSON, and NELSON, Circuit Judges.

Appellant's petition for rehearing is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CA No. 81-5602

DC No. CIV-81-393-PXH-VAC

UNITED STATES OF AMERICA,
*Appellee,*

vs.

PHOENIX UNION HIGH SCHOOL DISTRICT, *et al.*,
*Appellants.*

[Filed Oct. 7, 1982]

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## NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Appellants, PHOENIX UNION HIGH SCHOOL DISTRICT, PATRICK HENDERSON, MARY K. CARR, V. A. DUNHAM, JR., GEORGIE GOODE, DON KENNEDY, and MARY PRICE, hereby appeal to the United States Supreme Court from this Court's Judgment of July 23, 1982, affirming the judgment of the United States District Court for the District of Arizona, granting Appellee's Motion for Summary Judgment.

DATED this 5 day of October, 1982.

DECONCINI MCDONALD BRAMMER
YETWIN & LACY, P.C.

By /s/ J. Wm. Brammer, Jr.
J. WM. BRAMMER, JR.
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Tucson, Arizona 85701
Attorneys for Appellants

Copy of the foregoing
mailed this 5 day of
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The Honorable Valdemar A. Cordova
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CA No. 81-5602

DC No. CIV-81-393-PHX-VAC

UNITED STATES OF AMERICA,
*Appellee,*

vs.

PHOENIX UNION HIGH SCHOOL DISTRICT, *et al.*,
*Appellants.*

[Filed Nov. 20, 1980]

AMENDED NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Appellants, PHOENIX UNION HIGH SCHOOL DISTRICT, PATRICK HENDERSON, MARY K. CARR, V. A. DUNHAM, JR., GEORGIE GOODE, DON KENNEDY, and MARY PRICE, hereby appeal to the United States Supreme Court from this Court's Judgment of July 23, 1982, affirming the Judgment of the United States District Court for the District of Arizona, granting Appellee's Motion for Summary Judgment.

This appeal is taken pursuant to 11 U.S.C. § 1254(2).

DATED this 8th day of November, 1982.

DECONCINI MCDONALD BRAMMER
YETWIN & LACY, P.C.

By /s/ J. Wm. Brammer, Jr.
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